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No. 87-2047

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES B. FEASTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
ROBERT E. LINDSAY
HOWARD M. SOLOMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12

QUESTION PRESENTED

Whether the filing of a tax return is a required element of the offense of willfully counseling or advising the preparation or presentation of a false income tax return, in violation of 26 U.S.C. 7206(2).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Butzman v. *United States*, 205 F.2d 343 (6th Cir.), cert. denied, 346 U.S. 828 (1953)	5, 6
United States v. *Crooks*, 804 F.2d 1441 (9th Cir. 1986)	7
United States v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984)	4, 5
United States v. *Habig*, 390 U.S. 222 (1968)	5
United States v. *Perez*, 565 F.2d 1227 (2d Cir. 1977)	7
United States v. *Shortt Accountancy Corp.*, 785 F.2d 1448 (9th Cir.), cert. denied, 478 U.S. 1007 (1986)	7
United States v. *Wolfson*, 573 F.2d 216 (5th Cir. 1978)	7

Constitution and statutes:

U.S. Const. Amend. V	2
Revenue Act of 1924, ch. 234, § 1017(c), 43 Stat. 344	8
18 U.S.C. 641	1
18 U.S.C. 1343	2
18 U.S.C. 1503	1
18 U.S.C. (Supp. IV) 3013	8
26 U.S.C. 7201	1
26 U.S.C. 7206(2)	2, 4, 5, 6, 7, 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 843 F.2d 1392 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988. The petition for a writ of certiorari was filed on June 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of attempted tax evasion for 1979, in violation of 26 U.S.C. 7201 (Count 1); obstruction of justice, in violation of 18 U.S.C. 1503 (Count 6); theft of government property, in violation of 18 U.S.C. 641 (Count 7); wire fraud, in

violation of 18 U.S.C. 1343 (Count 10); and counseling or advising the preparation or presentation of a false income tax return, in violation of 26 U.S.C. 7206(2) (Count 11). He was acquitted of six other counts against him. The district court sentenced him to five years' imprisonment and a $10,000 fine on Count 1. In addition, the court imposed concurrent terms of five years' imprisonment on Counts 6 and 7, a concurrent term of three years' imprisonment on Count 11, and a consecutive five-year term of probation on Count 10.

1. The evidence pertaining to Count 11, which is the only count that petitioner contests in this Court, was as follows: The Internal Revenue Service began an undercover investigation of petitioner, a tax attorney, after receiving information that he was assisting individuals in filing false tax returns (Pet. App. A1-A2). During the investigation Terrence Johnson, an IRS undercover investigator posing as a narcotics dealer, met with petitioner on several occasions. Two of the meetings, which occurred in December 1985 and January 1986, were recorded on videotape. In the course of those meetings, petitioner gave Johnson detailed advice about avoiding the payment of taxes on income realized from illegal narcotics trafficking.

Petitioner advised Johnson that he should not report all of his income on his federal income tax return; that, in response to the question on the federal income tax return concerning the source of his income, he should claim his Fifth Amendment privilege against compulsory self-incrimination; that Johnson should not tell petitioner how much money Johnson had earned in his narcotics business, because then petitioner and Johnson would become co-conspirators in a conspiracy to evade taxes; and that Johnson should use petitioner's address on his federal income tax return. Petitioner also told Johnson that he

should invest the proceeds from his narcotics business in legitimate businesses; that he should hide his money in safe deposit boxes registered in other persons' names; and that he should use nominees for his investments or expenditures of money. Gov't C.A. Br. 7-10.

During their meetings, petitioner repeatedly emphasized that Johnson should report as income only those expenditures that could be traced, plus a "cushion" to cover any income that might be subject to verification. Petitioner also provided Johnson with a worksheet that he told Johnson to complete and return to him. Petitioner explained that he would use the worksheet to prepare Johnson's federal income tax return. Gov't C.A. Br. 9.

When Johnson completed the worksheet, he and petitioner met again to review the worksheet and to discuss any other information petitioner needed to prepare Johnson's income tax return. During the meeting, petitioner reiterated the advice he had given Johnson earlier, and he told Johnson to destroy any records he had relating to their discussions of the preparation of tax returns. Petitioner also tore off a portion of the worksheet on which Johnson had indicated that he had $3 million in his safe deposit boxes. Petitioner destroyed that portion of the worksheet by eating it. At the end of the meeting, petitioner also destroyed other documents, explaining that they constituted potential evidence. Petitioner then told Johnson that he would prepare Johnson's income tax return from the information Johnson had given him. Gov't C.A. Br. 9-11.

Johnson telephoned petitioner the following day. At that time, petitioner expressed some reluctance to deal with Johnson but agreed to meet with him again. Prior to the scheduled meeting date, however, petitioner told Johnson that he would not represent Johnson, because Johnson's case was "too heavy." Accordingly, no tax

return was prepared or filed as a result of petitioner's advice. Gov't C.A. Br. 11.

2. The court of appeals reversed petitioner's conviction on Count 7, which charged him with theft of government property, but it affirmed the four remaining convictions, including the conviction on Count 11, which charged petitioner with counseling the preparation of a false income tax return, in violation of 26 U.S.C. 7206(2) (Pet. App. A1-A28). In addressing petitioner's conviction on Count 11, the court of appeals concluded that the filing of an income tax return is not a required element of Section 7206(2). Pet. App. A4-A5. The court declined to follow the contrary decision of the Ninth Circuit in *United States* v. *Dahlstrom*, 713 F.2d 1423, 1429 (1983), cert. denied, 466 U.S. 980 (1984). Instead, the court relied on the plain language of Section 7206(2), noting that the statute provides in the alternative "that a violation occurs if a person aids, assists, counsels, or advises the preparation *or* presentation of a fraudlent tax return" (emphasis in original). Because petitioner had clearly counseled and advised the preparation of a fraudulent tax return, the court of appeals found that it was not necessary for the government to prove that a return was actually filed. Pet. App. A5.

ARGUMENT

We agree with petitioner that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Dahlstrom, supra*. Nonetheless, we believe that for several reasons review of the issue is not warranted at this time. First, the decision in this case is correct. Second, the issue does not arise with sufficient frequency to warrant review. And third, in light of the concurrent sentences petitioner received on the other counts on which he was convicted,

the resolution of the issue in this case would not have a significant effect on petitioner.

1. In *Dahlstrom*, a divided Ninth Circuit panel held that the filing of a tax return is an element of a Section 7206(2) violation. One of the defendants in *Dahlstrom* prepared a return for a person who was cooperating with an IRS investigation. The evidence showed that the cooperating witness never intended to file that return or represent it as his true return. 713 F.2d at 1426, 1429. The court of appeals reversed the defendants' convictions on the count relating to the preparation of that return in a brief passage in which the court concluded that prior decisions had established that a return must be filed in order for there to be a violation of Section 7206(2).[1]

In holding that filing a return is a necessary element of Section 7206(2), the *Dahlstrom* court relied on this Court's decision in *United States* v. *Habig*, 390 U.S. 222 (1968), and the Sixth Circuit's decision in *Butzman* v. *United States*, 205 F.2d 343, cert. denied, 346 U.S. 828 (1953). As Judge Goodwin recognized in his dissenting opinion in *Dahlstrom*, 713 F.2d at 1430-1431, however, the cases cited by the majority did not hold that the filing of a return is a necessary element of a Section 7206(2) offense, but only that *if* a return is filed, the offense is deemed to be complete at the time of filing. See *United States* v. *Habig*, 390 U.S. at 223; *Butzman* v. *United States*, 205 F. 2d at 350-351. The question decided by those cases was when the statute of limitations begins to run for the offense of aiding the preparation and filing of a false return (see *Habig*, 390 U.S. at 222; *Butzman*, 205 F.2d at 346). Those cases did not address the separate question whether

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[1] The government sought certiorari in *Dahlstrom*, but not on the issue presented in this case. This Court denied the government's petition. 466 U.S. 980 (1984).

proof that a return was actually filed is required in a prosecution for counseling and advising the preparation of a false return.[2]

The court of appeals in this case was correct in concluding that the plain language of Section 7206(2) is sufficient to resolve this case. By its terms, the statute prohibits aiding or advising either the preparation or the presentation of a fraudulent income tax return. The offense, therefore, can be committed simply by counseling a taxpayer to file a false return; nothing in the statute suggests that the taxpayer must follow that advice and actually file the return in order for the offense to be committed. Indeed, if Congress had intended to require the filing of a return, it is unlikely that it would have made it unlawful to counsel the "preparation" as well as the "presentation" of a false return.

The policy underlying Section 7206(2) also supports the court of appeals' construction of the statute. Corrupt advice endangers the internal revenue system regardless of whether false returns are actually prepared or filed. Each instance in which corrupt advice is given carries with it the threat that a false return will be filed and the collection of the revenues impeded. It would hardly further the efficient administration of the tax laws if a dishonest tax preparer or advisor could escape punishment and continue his corrupt activities merely because of the fortuitous circum-

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[2] In dictum, the court in *Butzman* stated without extended discussion that no crime under Section 7206(2) would have been committed if the document had not been filed. 205 F.2d at 351. Because the issue in that case was when the statute of limitations begins to run in a case in which a return is filed, it was, of course, not necessary for the court to decide whether the actual filing of a document is an element of a Section 7206(2) violation. In light of the Sixth Circuit's ruling in this case that the filing of a return is not an element of a Section 7206(2) violation, it is clear that the dictum in *Butzman* is not considered to be binding even within its own circuit.

stance that the false return has not been prepared or filed when the activity is discovered.

2. Regardless of the merits of the question presented, there is no need for the Court to grant review in this case. There have been very few prosecutions under Section 7206(2) in which a return has not been filed. *Dahlstrom* and the instant case are the only such cases of which we are aware, and we do not anticipate that the frequency of such prosecutions will increase in the future. Moreover, because the decision in this case is unpublished, it is of limited precedential effect even within the Sixth Circuit, and it is not likely to have any effect on the administration of the tax laws outside of that circuit.[3]

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[3] Petitioner cites several other court of appeals decisions by way of suggesting that the conflict is broader than simply between this case and *Dahlstrom*. In fact, however, the other cases that he cites do not conflict with either this case or *Dahlstrom*. In *United States* v. *Crooks*, 804 F.2d 1441, 1448 (1986), and *United States* v. *Shortt Accountancy Corp.*, 785 F.2d 1448, 1453, cert. denied, 478 U.S. 1007 (1986), the Ninth Circuit simply cited *Dahlstrom* as standing for the proposition that a return must be filed in order to satisfy the requirements of Section 7206(2); neither of those cases, however, involved a prosecution in which a return was not filed. *United States* v. *Perez*, 565 F.2d 1227 (2d Cir. 1977), is even less pertinent. In that case—one in which a return was filed—the court of appeals simply summarized the elements of Section 7206(2) as requiring that the defendant "aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return" (565 F.2d at 1233-1234). Although the court referred to "preparation *and* presentation," rather than using the correct statutory term "or," that deviation from the statutory language does not appear to have been intended to have any particular significance. In any event, even the inclusion of the term "and" does not resolve the issue presented in this case, since petitioner advised both the preparation of a false return and the presentation of a false return. Even under the language used by the court in *Perez*, petitioner could properly be convicted in spite of the fact that a return was never actually filed. Finally, *United States* v. *Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978), is not in conflict with *Dahlstrom*, because

3. Not only will the Sixth Circuit's decision have little or no practical effect on the law, it will have only the most modest effect on petitioner himself. The court of appeals upheld petitioner's convictions on three other felony counts and imposed greater concurrent sentences on two of those counts. The only effect of the conviction on the one count that petitioner challenges in this Court is to impose on him an additional $50 special assessment under 18 U.S.C. (Supp. IV) 3013. In light of the de minimis effect of the Section 7206(2) conviction on petitioner, any review of the conflict among the circuits should be postponed at least until it becomes apparent that the conflict is likely to arise in more than the current total of two reported prosecutions in the 64-year history of the statute, which dates back to the Revenue Act of 1924 (see § 1017(c), 43 Stat. 344).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

ROBERT E. LINDSAY
HOWARD M. SOLOMAN
Attorneys

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the *Wolfson* court simply held that a person does not have to be a "tax preparer" in order to be liable under Section 7206(2); the court did not address the question whether the filing of a return is an element of that offense.

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